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No. 02-9410

IN THE
Supreme Court of the United States

MICHAEL D. CRAWFORD,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After a full round of briefing, it has become clear that this Court should abandon the *Roberts* framework and hold that the Confrontation Clause prohibits the admission of *ex parte* testimonial statements, regardless of their perceived reliability. The United States agrees with Petitioner that *Roberts* should be reconsidered because the "historical basis of right to confrontation" (Br. at 10) supports applying the Clause only to in-court testimony and its functional equivalent. Even the State does not seriously dispute that the testimonial approach has a pedigree that is vastly superior to that of the *Roberts* framework. And it can hardly be doubted that the testimonial approach generates the predictability and stability that the *Roberts* framework inherently lacks. While the State and the United States assert that enforcing the Confrontation Clause as the Framers intended could sometimes impede a search for truth, this concern does not supply a legitimate or compelling reason to perpetuate *Roberts*' reliability-based conception of the Confrontation Clause, either *in toto* or (as the United States would have it) as applied only to testimonial statements. The right to confrontation is one of the very few procedural rules that the Constitution deems essential to the integrity of any criminal conviction obtained at trial, and it cannot be dispensed with simply because a trial court thinks – as it might in a civil case – that it can still get to an acceptable level of "truth" without it.

The State's defense of the Washington Supreme Court's "interlocking confession" rule is weaker still. It attempts to transform this Court's rejection of an interlocking theory in *Lee v. Illinois,* 476 U.S. 530 (1986), into a holding that condones such analysis. And it ignores the power of this Court's subsequent ruling in *Idaho v. Wright,* 497 U.S. 805 (1990), that courts cannot use other testimony at trial to bootstrap incriminating hearsay into evidence and that, in any event, the totality of the circumstances, not any single factor,

determines reliability. Accordingly, even if this Court applies the *Roberts* framework here, it still should hold that the admission of Sylvia's statement violated the Confrontation Clause.

I. This Court Should Abandon the *Roberts* Framework in Favor of the Testimonial Approach.

The State urges this Court to reject the testimonial approach. The United States advocates something of a crossbreed approach, under which courts would apply the testimonial approach to nontestimonial hearsay, but would revert back to the *Roberts* framework regarding testimonial hearsay. But nothing in the State's brief or the United States' amicus brief should dissuade this Court from applying the pure testimonial approach to hold that the Confrontation Clause prohibited the admission of Sylvia's custodial statement. That approach is superior to each part of the *Roberts* framework in terms of every conventional method of constitutional interpretation. And nothing in the doctrine of *stare decisis* forecloses returning the right to confrontation, as the testimonial approach would, to its traditional mode of operation.

A. The Testimonial Approach is Superior to the *Roberts* Framework in Terms of Every Conventional Method of Constitutional Interpretation.

The State does not dispute Petitioner's arguments (Petr. Br. at 12-20, 28-34, 36-37) that the testimonial approach, unlike the *Roberts* framework, comports with the history, purpose, and structure of the Confrontation Clause. The State contends, however, (1) that the testimonial approach is at odds with the text of the Clause; (2) that it would not provide any more consistency than the *Roberts* framework produces; and (3) that it improperly would implement a "public policy" that is

"more favorable to the defense." Resp. Br. at 13-14. In addition, the United States, while accepting Petitioner's position that the scope of the Confrontation Clause should be trimmed back to cover only testimonial hearsay, urges this Court to retain *Roberts*' reliability-based framework as applied to such statements. None of these arguments has merit.

First, contrary to the State's assertion (Resp. Br. at 3, 13), the testimonial approach is perfectly consistent with the text of the Confrontation Clause. As Petitioner explained in his opening brief, the testimonial approach rests in large part on the meaning of the word "witness." By investing that word with its ordinary meaning – one who "gives testimony" – the Clause applies only to hearsay statements that declarants would reasonably expect to be used prosecutorially. Petr. Br. at 35-36. It does not exclude all (or even most) hearsay.

While this Court has noted that a "literal interpretation of the Confrontation Clause *could* bar the use of any out-of-court statements when the declarant is unavailable," *Bourjaily v. United States*, 487 U.S. 171, 182 (1987) (emphasis added), the testimonial approach's construction of the word "witness" is truer to the constitutional text and avoids this "unintended" and "extreme" result. *See id.* It also accords with this Court's statement in *Cruz v. New York*, 481 U.S. 186 (1987), that "[o]rdinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause . . . if his *testimony* is part of the body of evidence that the jury may consider in assessing his guilt." *Id.* at 190 (emphasis added). The testimonial approach thus represents a better reading of the Confrontation Clause than the *Roberts* framework's construction, which interprets the term "witness" to mean any declarant of any statement to anyone at any time.

Second, the testimonial approach produces much more consistent and predictable results than the *Roberts* framework generates. Under the testimonial approach, the critical question is whether a reasonable person in the declarant's position would have expected her statement to be used prosecutorially – that is, as evidence against someone during a criminal inquiry. In the vast majority of cases, including those raising the most obvious confrontation problems, this is an easy question to answer. Someone giving an incriminating statement at a legal proceeding, to the police, or under similar investigative circumstances would reasonably expect his statement to be used prosecutorially. On the other hand, a person speaking to a co-conspirator in furtherance of a conspiracy; describing her present sense impressions; keeping routine business records; or speaking in a multitude of other ways in the course of ordinary daily life would not reasonably expect her statement to be used prosecutorially.[1]

The *Roberts* "particularized guarantees of trustworthiness" inquiry, however, makes every case involving a

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[1] While the United States notes that many of these modern hearsay exceptions have roots that go back many years, *see* Amicus Br. of United States at 13 n.5, it incorrectly suggests that the "against penal interest" exception – the exception that the Washington courts invoked here – has such a pedigree. The plurality opinion in *Lilly v. Virginia,* 527 U.S. 116 (1999), explained without disagreement that the practice of admitting accomplices' confessions that incriminate criminal defendants (that is, testimonial statements against penal interest), is "of quite recent vintage." *Id.* at 130. The passage of Wigmore that the United States cites is in accord. That passage describes the roots of the hearsay exception for statements against *pecuniary or proprietary* interest, and specifically notes that older English common law and American courts "exclude[ed] confessions of a crime or statements of facts against penal interest, made by third persons" from the scope of this general "statements against interest" exception to the hearsay rule. 5 Wigmore on Evidence § 1476, at 351-58 (Chadbourn rev. 1974).

testimonial statement dependent on a multitude of facts and circumstances and admits to no dependable formulae, even when – as cases such as *Lilly v. Virginia,* 527 U.S. 116 (1999), demonstrate – it should be plain that there is a serious confrontation problem. *See* Petr. Br. at 38-40; Amicus Br. of NACDL & ACLU at 15-21. It also depends heavily on subjective views of trial and appellate judges. *Id.* Abandoning *Roberts*' reliability-based methodology in favor of the testimonial approach would take the current guesswork and malleability out of the Confrontation Clause.

Third, the State is simply wrong that Petitioner is asking this Court merely to replace one public policy compromise with another that is more favorable to defendants. In every post-*Roberts* case this Court has decided, the testimonial approach dictates the same conclusion as the *Roberts* framework produced. *See* Petr. Br. at 22-23. In future cases, as Petitioner explained in his opening brief, applying the testimonial approach could in some cases benefit defendants compared to the *Roberts* framework, while in others it could work to their disadvantage by terminating the Confrontation Clause's oversight over ordinary hearsay issues. Petr. Br. at 33; *see also* Motion of Law Professors for Leave to File Amicus Br. at 2 ("Our interest in this case is not to support either prosecution or defense – in some settings the [testimonial approach] would favor one side and in some settings the other – but to assist the placement of the Confrontation Clause on a proper footing, as expressing a rather narrow but hard-edged right.").

In any event, the testimonial approach is grounded in constitutional precepts, not public policy. And when, as here, a particular rule is "imposed directly by the Constitution, . . . [i]t is not for this Court" or any party "to employ untethered notions of what might be good public policy" to justify a certain result. *Whitmore v. Arkansas,* 495 U.S. 149, 161

(1990); *see also Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 815-16 (1984) (even if "[p]lausible public policy arguments" support a position, "it by no means follows that it is therefore constitutionally mandated" or "constitutionally permissible"). To the extent that the *Roberts* framework and the State's meager defense of it are based upon policy considerations, this Court is bound to reject those arguments in deference to the judgments that the Framers reached in creating the Sixth Amendment.

Finally, the United States is mistaken in suggesting (Br. at 17-27) that it is appropriate to revert back to the *Roberts* framework's reliability-based methodology when, as here, the declarants of testimonial statements are unavailable. In stark contrast to the analysis in the first half of the United States' brief, this argument lacks any historical, textual, or structural support. Indeed, as the United States previously recognized in discussing *Roberts*' particularized guarantees inquiry, "it seems . . . unlikely that the Framers intended the right to confrontation to be transformed into a general test for reliability of out-of-court statements." Brief for United States at 27-28, *White v. Illinois,* 502 U.S 346 (1992) (No. 90-6113). The United States' current proposal also is impossible to square with the development of the unequivocal confrontation right at common law, *see* Petr. Br. at 14-20, 29-30, or with Justice Thomas' recent observation that it does not appear likely that "the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of ex parte affidavits found to be reliable." *White v. Illinois,* 502 U.S. 346, 363 (1992) (Thomas, J., concurring in part and concurring in judgment).

Aside from opinions applying the *Roberts* framework itself, which obviously provide merely circular justification for the United States' proposal, the government cites only two types of confrontation cases in support of its argument: (1) cases considering the question whether defendants are always

entitled to face-to-face, as opposed to some other type, of confrontation, *see Maryland v. Craig,* 497 U.S. 836 (1990); *Coy v. Iowa,* 487 U.S. 1012 (1988); and (2) pre-*Roberts* cases discussing whether the confrontation right is "absolute," *see Chambers v. Mississippi,* 410 U.S. 284, 295 (1973) (citing *Mancusi v. Stubbs,* 408 U.S. 204 (1972), for that proposition); *Mattox v. United States,* 156 U.S. 237 (1895). But neither of these types of authority bears fruit.

First, the question whether a particular type of confrontation is acceptable is entirely distinct from whether a defendant is entitled to confrontation at all. And while the Framers' inability to foresee technological developments such as closed-circuit television generates some uncertainty as to how the Confrontation Clause ought to apply in such situations, the Framers, as well as common law and early American judges, were keenly aware that witnesses who give pretrial testimonial statements sometimes become unavailable for trial. That the Framers consistently understood the confrontation right as precluding reliability assessments under such circumstances (*see* Petr. Br. at 14-20, 29-30) shows that the Confrontation Clause's unqualified phrases "shall have the right," "all criminal prosecutions," and "the witnesses" mean what they say.

Second, every pre-*Roberts* case that states that the right to confrontation is "not absolute" does so only in the context of addressing whether the admission of a now-unavailable witness's prior testimony *that was subjected to cross-examination* contravenes the Confrontation Clause. Early cases recognized that the text of the Clause could strictly be read to prohibit the use of such incriminating testimony, *see, e.g., Mattox,* 156 U.S. at 339-40, but this Court has consistently held that the Clause incorporates the common law's "exception" allowing it. *Id.*; *Mancusi,* 408 U.S. at 213-14. This "exception" is entirely consistent with the testimonial

approach that Petitioner and the other amici advocate. Indeed, it is not really an exception at all, for it adheres to the traditional demand that all incriminating testimony be subjected to cross-examination. In no way does this prior testimony rule suggest that *Roberts'* reliability exception for untested testimony has any basis in sound principles of constitutional interpretation.[2]

In the end, the United States is asking this Court, without any real support, to abolish the half the *Roberts* framework that favors defendants, but to perpetuate the half that favors prosecutors on the ground that this half "promote[s] reliability and accuracy in criminal trials." Amicus Br. of United States at 18. But this would turn the foundations of our criminal justice system are not so one-sided. It would be outlandish to hold, for instance, that protections such as the right against self-incrimination or the right to counsel could be dispensed with simply because the judge thought that this would advance the search for truth. Even more to the point, it is an unquestioned, categorical rule that if a prosecution witness refuses to submit to cross-examination, his testimony must be struck. *See* Petr. Br. at 36. There is no inquiry under those circumstances into the testimony's reliability. There likewise should not be any such inquiry when the testimony was obtained prior to trial, with even fewer procedural protections in place.

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[2] The other Sixth Amendment cases that the United States cites in support of its position (*see* Br. at 19 n.10, 20-21), which deal with the scope of permissible cross-examination, the right to counsel, and compulsory process, are even farther afield. Those cases all deal with the *extent* of a Sixth Amendment right once it has attached. The question here, however, is whether the right to confrontation attaches at all. When faced with questions of that nature, this Court, outside of the *Roberts* framework, has never held that a constitutional guarantee does not attach simply because a trial judge thinks that the trial will nevertheless produce a reliable result.

Even if one were to accept the United States' dubious premise that courts may ignore the few rules of criminal procedure upon which the Framers insisted when those rules might impede the search for truth, it still would not follow that this Court should retain the *Roberts*' particularized guarantees test as an escape hatch from the dictates of the testimonial approach. The particularized guarantees test, as Petitioner explained at length in his opening brief, has proven in practice to be systematically incapable of separating "true" testimonial statements from misleading ones. Petr. Br. at 38-42; *see also* Amicus Br. of NACDL & ACLU at 16-22; Amicus Br. of Law Professors at 18-19. Consequently, when courts invoke the *Roberts* framework to permit the government to submit purportedly reliable testimonial hearsay, the truth-seeking process, more often than not, is subverted because the statements at issue are *not* so dependable that cross-examination truly would have been of marginal utility. *See id.* The Unites States has no answer for this problem. Furthermore, even if, as the United States hypothesizes, one sometimes could say with the certainty necessary in a criminal prosecution that a witness was trying to be honest in giving an incriminating *ex parte* statement, admitting the statement could still undermine the truth-seeking process in any number of ways. It could, for instance, allow evidence that is distorted by a witness's faulty or partial recollections, *see* Petr. Br. at 31-33; that is warped by the subconscious yet inherent pressures of criminal litigation, *id.*; or that has been altered by "an artful or careless scribe," William Blackstone, Commentaries on the Laws of England *374 (1768).

The United States never comes to grips with any of these possibilities. Once one considers them, as the creators of the common law and the Framers of our Constitution did, the propriety of the confrontation rule that "never" allows untested testimonial statements "as evidence against the [defendant]" is apparent. *United States v. Burr,* 2 F. Cas. 187, 194 (C.C. Va.

1807) (No. 14,694) (Marshall, C.J.). The alternative of permitting the courts to pass on the reliability of otherwise unacceptable testimony is simply all too similar to the approach utilized in Raleigh's trial, *see* Petr. Br. at 13-14, 30, 40 & n.10, which the United States itself acknowledges was "notorious," Amicus Br. of United States at 11 n.3, and which spurred the adoption of the confrontation right in the first instance. *See also Lilly,* 527 U.S. at 141-42 (Breyer, J., concurring).[3]

B. *Stare Decisis* is Not an Impediment Here.

Although the State attempts to portray Petitioner's position as advocating a "wholesale abandonment" of this Court's prior confrontation jurisprudence (Resp. Br. at 10),

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[3] Retaining a rule that allows the government to introduce *ex parte* testimony when it is deemed "reliable" also subverts the judicial process's truth-seeking function in one other, somewhat more subtle, way: it undermines the incentive for law enforcement to submit pre-trial testimonial statements to adversarial testing – a process that all agree produces the best possible evidence. If, for example, law enforcement obtains an accomplice's confession and it fears that it might not be able to replicate that testimony later, the government can protect against any potential loss to the judicial process's search for truth simply by memorializing the accomplice's testimony under oath and allowing the defendant the opportunity to cross-examine her. *See, e.g.,* Fed. R. Crim. P. 15(a) (permitting pre-trial depositions "in order to preserve testimony for trial"); Wash. Crim. R. 4.6(a) (same when a prospective witness may be unavailable for trial). Yet by preserving *Roberts*' reliability-based conception of the Clause, the inducement to generate this type of "best evidence" is largely lacking. *See, e.g., Manocchio v. Moran,* 708 F. Supp. 473, 478 (D.R.I. 1989) (holding that defendant's confrontation rights were violated by admission of nontestifying state coroner's report and noting that the prosecution could have avoided this problem by deposing the coroner with the defendant present), *rev'd,* 919 F.2d 770 (1st Cir. 1990) (reinstating conviction because coroner report satisfied *Roberts*' particularized guarantees test).

principles of *stare decisis* do not, in fact, present any obstacle to abandoning the *Roberts* framework and restoring the Confrontation Clause to its traditional mode of operation. The doctrine of *stare decisis* generally is limited to requests to "overrule" precedent. *E.g., Harris v. United States,* 536 U.S. 545, 557 (2002). Here, however, this Court need not overrule any of its prior holdings in order to formally adopt the testimonial approach. *See* Petr. Br. at 22-23. Consequently, this situation is much more like that in *Sandin v. Connor,* 515 U.S. 472 (1995), where this Court, without mentioning any *stare decisis* impediment, abandoned a relatively new mode of analyzing prisoners' due process claims in a way that did not require it to overrule any prior holding. *See* Petr. Br. at 27 (elaborating on *Sandin* decision).

But even if this case did implicate *stare decisis* type principles, those principles would not stand in the way of abandoning the *Roberts* framework. This Court has explained that *stare decisis* concerns are at their nadir when adhering to recent precedent "involves a collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience" and scholarly opinion. *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases *better serves* the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 230 (1995). When faced with such situations, therefore, this Court repeatedly has held that the better course is to reinstate the prior, intrinsically sounder doctrine. *See id.* at 230-31 (overruling recent precedent that undermined cases that came before it and that "ha[d] been consistently criticized by commentators"); *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent

decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States,* 483 U.S. 435, 439-41 (1987) (overruling decision that had caused "confusion" and had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent, and which "[t]he great weight of scholarly opinion had been critical"); *Swift & Co. v. Wickham,* 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in older cases).

These same considerations are starkly present here. The *Roberts* framework, which first interjected hearsay law and the general touchstone of "reliability" into confrontation jurisprudence, is of "fairly recent vintage." *Lilly,* 527 U.S. at 140 (Breyer, J., concurring). It has never been shown to be rooted in constitutional principles, and it has been the subject of extensive scholarly criticism. *See* Petr. Br. at 26; Amicus Br. of Law Professors at 2-30. Indeed, aside from the Respondent, not one single governmental entity, defense-oriented group, or academic defends it here. Furthermore, the *Roberts* framework – as Petitioner explained in his opening brief and as the State does not dispute here – inherently leads to inconsistent and anomalous results. *See* Petr. Br. at 38-42.

In contrast, the testimonial approach – as well as its particular, unqualified prohibition against using a nontestifying accomplice's custodial statement against the accused – is grounded in centuries of precedent, dating back to the mid-1600's. *See* Petr. Br. at 12-21. It tracks all of this Court's confrontation jurisprudence into the 1970's, which consistently held that *ex parte* testimonial statements were inadmissible without any need to inquire into the statements' potential reliability, and which never suggested that the Confrontation

Clause applied outside of the testimonial context. *See* Petr. Br. at 16-21, 24-25. It also fulfils what this Court consistently has said is the primary purpose of the Confrontation Clause: to prevent defendants from being tried on the basis of *ex parte* testimony. It has been repeatedly endorsed by the federal government[4] – although the government now, unlike in past filings, qualifies its endorsement with respect to testimonial statements that courts might deem reliable – and it is supported here by the Nation's leading criminal defense and civil liberties organizations. *See* Amicus Br. of NACDL & ACLU at 22-26. Finally, extensive scholarship confirms that the testimonial approach, unlike the *Roberts* framework, is intrinsically sound and predictable in operation. *See* Petr. Br. at 26 (citing numerous articles to this effect); Amicus Br. of Law Professors at 21-22.

In all events, the time has come to restore the Confrontation Clause to its traditional operation and scope, and to abandon the *Roberts* framework in favor of the testimonial approach.

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[4] *See* Amicus Br. of United States at 7-8; Brief for United States at 17-29, *White v. Illinois,* 502 U.S. 356 (1992) (No. 90-6113); Brief for United States at 12-24, 27-28, 33-36, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580).

II. Even if this Court Applies the *Roberts* Framework Here, Sylvia's Custodial Statement Was Still Inadmissible Regardless of the Extent of its Interlocking Nature.

The State fails to advance any persuasive argument in defense of the Washington Supreme Court's "interlocking confession" holding. That holding contravenes the requirement that, in order to satisfy the *Roberts* framework, an out-of-court statement must be inherently reliable, without taking into account any other substantive evidence at trial. And even if evidence of interlock were relevant to this inquiry, the totality of the circumstances here still demonstrates that Sylvia's statement was unreliable, regardless of the extent of its interlocking nature.

A. Whether a Suspected Accomplice's Custodial Statement Interlocks with the Defendant's Statement is Irrelevant to the Particularized Guarantees Inquiry.

Contrary to the State's argument (Resp. Br. at 5-7, 9-10), neither this Court's precedent nor "[c]ommon sense" dictates that the interlocking nature of Sylvia's custodial statement is relevant to whether the Confrontation Clause allowed its admission against Petitioner.

This Court has never upheld the admission of an accomplice's custodial confession that incriminated a criminal defendant on an "interlocking" or any other basis. In *Lee v. Illinois,* 476 U.S. 530 (1986), the case upon which the State most heavily relies, this Court held that the Confrontation Clause *prohibited* the admission of the statement at issue. And in *New Mexico v. Earnest,* 477 U.S. 648 (1986), which the State contends "confirmed the 'interlocking confession' rule" (Resp. Br. at 1, 6), this Court simply granted, vacated and

remanded a lower court decision it had held pending the outcome in *Lee.* The order did not contain any opinion from this Court, and even the concurring opinion by then-Justice Rehnquist did not elaborate on *Lee*'s analysis. Thus, contrary to the State's suggestion (Resp. Br. at 7), this Court's decision in *Idaho v. Wright,* 497 U.S. 805, 822 (1990), did not need to "overrule" *Lee* or any other case in order to put to rest that opinion's suggestion that the Confrontation Clause might permit courts to rely on the substance of a defendant's custodial statement in assessing the reliability of an accomplice's statement. Rather, the *Wright* Court merely needed to establish a rule that prohibits courts from using other evidence to bootstrap incriminating out-of-court testimony into evidence. That is exactly what the Court did.

Nor is there any justification for reading *Wright*'s anti-bootstrapping principle as applying, as the State would have it (Resp. Br. at 7), only to "physical evidence." *Wright* laid down a rule of general applicability: States may not use "other evidence at trial" to establish the trustworthiness of hearsay evidence used to convict a criminal defendant. 497 U.S. at 822. That this rule is not limited to physical evidence is confirmed by the plurality (and controlling) opinion in *Lilly.* That opinion applied *Wright* to bar the prosecution from using other witnesses' trial testimony and an accomplice's custodial and trial statements to establish the reliability of another nontestifying accomplice's custodial statement. *Lilly,* 527 U.S. at 137; *see also* Petr. Br. at 44. By the same token, the anti-bootstrapping rule precludes reliance upon Petitioner's custodial statement in assessing the reliability of Sylvia's statement.

Common sense does not dictate otherwise. Arguably corroborative oral evidence, whether it comes from the defendant or not, is no more capable than physical evidence of demonstrating a hearsay statement's reliability. To the

contrary, while physical evidence is objective and thus "inherently trustworthy," *United States v. Leon,* 468 U.S. 897, 907 (1984), and "typically reliable," *Stone v. Powell,* 476 U.S. 465, 490 (1976), oral evidence is subjective and thus susceptible to manipulation and obfuscation. Here, for example, Sylvia's first statement to the police contained "roughly the same account of the attack" as Petitioner's first statement. J.A. 3. Yet while the State contends in general that "[n]o hearsay is more reliable than" an alleged accomplice's custodial statement that interlocks with the defendant's statement, Resp. Br. at 9, it asserts in this very case that Sylvia's first interlocking statement was a "lie[]." J.A. 12. And while the State maintains that Sylvia's second statement is reliable because, like Petitioner's second statement, it is "ambiguous" on the issue of self-defense, Resp. Br. at 8, such a lack of clarity in a witness's memory or recitation regarding a critical factual matter hardly gives one confidence that her testimony is completely dependable. This Court has held, indeed, that such indistinct corroboration "poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." *Lee,* 476 U.S. at 545.

As Petitioner explained in his opening brief, the Confrontation Clause and the hearsay exceptions that the *Roberts* framework incorporates into it are aimed at assessing the reliability of the *circumstances* under which incriminating statements are made, not the reliability of the resulting statements themselves. Petr. Br. at 45-46. The *Roberts* framework accordingly demands as a threshold matter that if incriminating testimony cannot be subjected to cross-examination, it at least must have been given with procedural and circumstantial guarantees that effectively render that preferred method of probing its accuracy and inclusiveness unnecessary. *See Lilly,* 527 U.S. at 136 (plurality opinion); *Wright*, 497 U.S. at 819. The "interlocking confession" rule that the State proposes, however, ignores this procedural nature

of the confrontation right. It attempts to rationalize the use of hearsay evidence not by reference to its inherent trustworthiness, but by comparison to other substantive evidence. This Court should resist the State's effort to strip the Confrontation Clause of its well-established, gatekeeping role regarding the procedural acceptability of hearsay evidence offered against criminal defendants.

B. Even if Evidence of Interlock Were Relevant to the Particularized Guarantees Inquiry, the Totality of the Circumstances Still Demonstrates that Sylvia's Statement Lacks Such Guarantees of Trustworthiness.

Petitioner maintained in his opening brief that even if evidence of interlock were relevant here, Sylvia's statement was still inadmissible because the particularized guarantees test, according to this Court's precedent, requires an assessment of "the totality of the circumstances" surrounding hearsay evidence offered against criminal defendants, *Wright,* 497 U.S. at 820, and the totality of the circumstances here demonstrates that Sylvia's statement is not so reliable that cross-examination would have been of marginal utility. Petr. Br. at 46-50. The State does not contest this argument. Nor does the United States. *See* Amicus Br. of United States at 23 n.11. Accordingly, even if this Court decides to apply the *Roberts* framework here, it should still reverse the decision of the Washington Supreme Court and hold that Sylvia's statement was inadmissible.

CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

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